A

Kua Kia Soong v Chow Siew Hon

B

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO S-23–10 OF 2009
SU GEOK YIAM J
30 OCTOBER 2015

C

Civil Procedure — Judge — Application to recuse judge — High Court entered judgment for plaintiff after hearing only plaintiff's evidence at trial — Court found defendant's interpreter incompetent and refused to adjourn trial for defendant and witnesses to testify — Court of Appeal set aside judgment on appeal and remitted case back to High Court 'not necessarily before a different judge' for defendant's evidence to be heard — Previous judge assigned to continue hearing matter — Defendant applied to recuse judge on ground she already made findings of fact and law against defendant — Whether recusal should be granted — Whether defendant shown real danger of bias if judge continued to hear matter — Whether recusal would waste costs and court's time if new judge decided to hear case de novo — Whether stay of order refusing recusal pending appeal to be granted as situation was a 'special circumstance' and so that rule of natural justice that 'one should not be a judge in one's own cause' was not infringed

D

E

The plaintiff sued the defendant for damages for defamation. The defendant denied defaming the plaintiff and, alternatively, contended that if the words he uttered were defamatory, they were published on an occasion of qualified privilege. After the plaintiff closed his case at trial, the court adjourned the hearing to another date for the defendant and his witnesses to testify. On the adjourned trial date, the court ruled that the defendant's interpreter was incompetent, causing the defendant to ask for the trial to be postponed to enable him to appoint another interpreter acceptable to the court. The request was denied and the court entered judgment in default against the defendant in respect of liability. The parties were directed to submit on the issue of quantum of damages and costs and a date was fixed for decision. On the decision date, the court vacated its earlier default judgment and directed the parties to file written submissions in respect of both liability and quantum. A date was fixed for clarification/decision. On that date, the court allowed the plaintiff's claim and awarded him RM300,000 in damages. The Court of Appeal ('COA') set aside the decision on appeal, remitted the case back to the High Court for the trial to be continued 'not necessarily before a different High Court judge' to hear the testimonies of the defendant and his witnesses. When the defendant was informed that the continued trial would take place before the same judge, he wrote to the Chief Judge of Malaya requesting for a different judge on the ground the instant judge who had heard the matter had already made findings

F

G

H

I

of facts and law and ruled against him. The defendant's request was denied on the ground the case was part-heard and it was not suitable for the trial to be continued before a different judge and, furthermore, the COA had also not made such a direction. The defendant then applied vide encl 59 for the instant judge to be recused from hearing the matter further.

Held, dismissing encl 59 but allowing a stay of that decision pending appeal:

(1) On the facts and circumstances of the instant case, there was no real danger of bias on the instant judge's part if she continued with the trial by hearing the defendant's case. The defendant failed to show any fact which could lead a right-minded person to think there was a real danger of bias. Since the defendant would have a fair chance to present his case and to submit at the conclusion of the trial, there was no real likelihood of bias. The court's judgment after the conclusion of the defendant's case would be based on the evidence that had been adduced by the plaintiff earlier and the evidence that would be adduced by the defendant. If the Court of Appeal had thought that it was not proper or fair for the instant judge to continue with the trial, it would have ordered the case to be heard by another judge. The same was true of the decisions made by the managing judge and the Chief Judge of Malaya both of whom rejected the defendant's request to have the case continued before another judge (see paras 108–110, 116 & 120).

(2) The previous judgment of this court in the instant case was made after only the plaintiff's case was heard and without hearing the defendant's case because the defendant was not ready to proceed with his case by calling his witnesses including himself. The determination of facts concerning the issue of the plaintiff's reputation and good character and of whether the defendant had maliciously defamed the plaintiff were made solely on the evidence given by the plaintiff's witnesses. Even though conclusions of fact and law were arrived at, they were not prejudicial to the defendant because they were only based on the evidence of the plaintiff's witnesses without the benefit of the evidence of the defendant and his witnesses. The fact that judgment was given in favour of the plaintiff earlier did not by itself constitute a real danger of bias to justify recusal. If the recusal was allowed, parties would have to incur more costs and the time of the court spent hearing the plaintiff's case would be wasted if a new judge assigned to hear the case decided to order a trial *de novo*. The recusal application was an abuse of the court's process (see paras 117–118 & 120–122).

(3) The doctrine of *nemo judex in causa sua* (no one should be a judge in his own cause) relied upon by the defendant for the recusal application was inapplicable because the defendant had not adduced any evidence to show there would be a conflict of duty and interest on the instant judge's

part if she continued to hear the instant case until its conclusion (see paras 129).

(4) The defendant's application to stay the order dismissing encl 59 pending the outcome of the appeal against it was allowed because the situation came within the meaning of 'special circumstances' laid down in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 and so that the rule of natural justice that 'one should not be a judge in one's own cause' was not infringed (see paras 26–27).

[Bahasa Malaysia summary

Plaintif telah menyaman defendan untuk ganti rugi kerana fitnah. Defendan menafikan telah memfitnah plaintif dan, secara alternatif, menegaskan bahawa jika perkataan-perkataan yang diucapkannya berunsur fitnah, ia telah diterbitkan atas perlindungan bersyarat. Setelah plaintif menutup kesnya semasa perbicaraan, mahkamah telah menangguhkan perbicaraan itu kepada tarikh lain untuk defendan dan saksi-saksinya membuat keterangan. Pada tarikh perbicaraan yang ditangguhkan itu, mahkamah memutuskan bahawa jurubahasa defendan tidak kompeten, menyebabkan defendan meminta perbicaraan ditangguhkan bagi membolehkannya melantik jurubahasa yang boleh diterima oleh mahkamah. Permintaan itu dinafikan dan mahkamah memasukkan penghakiman ingkar terhadap defendan berkenaan liabiliti. Pihak-pihak telah diarahkan mengemukakan isu kuantum ganti rugi dan kos dan satu tarikh telah ditetapkan untuk keputusan. Pada tarikh keputusan itu, mahkamah mengosongkan penghakiman ingkar terdahulunya dan mengarahkan pihak-piak memfailkan penghujahan bertulis berkenaan kedua-dua liabiliti dan kuantum. Satu tarikh telah ditetapkan untuk penjelasan/keputusan. Pada tarikh tersebut, mahkamah membenarkan tuntutan plaintif dan mengawardkannya RM300,000 sebagai ganti rugi. Mahkamah Rayuan ('MR') telah mengetepikan keputusan atas rayuan, meremitkan kes semula kepada Mahkamah Tinggi untuk perbicaraan disambung 'not necessarily before a different High Court judge' untuk mendengar keterangan-keterangan defendan dan saksi-saksinya. Apabila defendan telah diberitahu bahawa sambungan perbicaraan akan berlaku di hadapan hakim yang sama, dia telah menulis kepada Hakim Besar Malaya memohon untuk hakim yang berbeza atas alasan hakim ini telah mendengar perkara itu telahpun membuat penemuan fakta dan undang-undang dan memutuskan terhadapnya. Permintaan defendan telah dinafikan atas alasan kes itu telah didengar separuh dan ia tidak sesuai untuk perbicaraan bersambung di hadapan hakim yang berbeza dan, tambahan pula, MR juga tidak membuat arahan tersebut. Defendan kemudian telah memohon melalui lampiran 59 agar hakim ini dilucutkan daripada mendengar perkara selanjutnya.

Diputuskan, menolak lampiran 59 tetapi membenarkan penggantungan bahawa keputusan sementara menunggu rayuan:

(1) Berdasarkan fakta dan keadaan kes ini, tiada bahaya sebenar yang berat sebelah di pihak hakim ini jika dia menyambung perbicaraan itu dengan mendengar kes defendan. Defendan telah gagal untuk menunjukkan apa-apa fakta yang boleh membawa kepada orang yang waras untuk berfikir terdapat bahaya sebenar yang berat sebelah. Oleh kerana defendan mempunyai peluang yang adil untuk mengemukakan kesnya dan untuk mengemukakan di akhir perbicaraan itu, tidak terdapat kemungkinan berat sebelah yang sebenar. Penghakiman mahkamah selepas kes defendan berakhir adalah berdasarkan keterangan yang telah dikemukakan oleh plaintif sebelum itu dan keterangan yang dikemukakan oleh defendan. Jika Mahkamah Rayuan berpendapat bahawa ia tidak wajar atau adil untuk hakim ini menyambung perbicaraan itu, ia akan mengarahkan kes itu didengar oleh hakim lain. Perkara sama adalah benar tentang keputusan yang dibuat oleh hakim urusan dan Hakim Besar Malaya kedua-duanya yang telah menolak permohonan defendan agar kes bersambung di hadapan hakim lain (lihat perenggan 108–110, 116 & 120).

(2) Penghakiman terdahulu mahkamah ini dalam kes ini telah dibuat hanya selepas kes plaintif didengar dan tanpa mendengar kes defendan kerana defendan tidak bersedia untuk meneruskan kesnya dengan memanggil saksi-saksinya termasuk dirinya sendiri. Penentuan fakta berkenaan isu tentang reputasi dan akhlak mulia plaintif dan tentang sama ada defendan berniat jahat untuk memfitnah plaintif telah dibuat semata-mata atas keterangan yang diberikan oleh saksi-saksi plaintif. Walaupun kesimpulan fakta dan undang-undang telah diperoleh, ia tidak memudaratkan defendan kerana ia hanya berdasarkan keterangan saksi-saksi plaintif tanpa manfaat daripada keterangan defendan dan saksi-saksinya. Fakta bahawa penghakiman itu telah diberikan berpihak kepada plaintif sebelum itu tidak dengan sendirinya merupakan bahaya sebenar tentang berat sebelah untuk mewajarkan pelucutan itu. Jika pelucutan itu dibenarkan, pihak-pihak mungkin akan menanggung lebih kos dan masa mahkamah yang digunakan untuk mendengar kes plaintif akan menjadi sia-sia jika hakim baharu ditugaskan untuk mendengar kes yang diputukan bagi memerintahkan satu perbicaraan *de novo.* Permohonan pelucutan itu adalah satu penyalahgunaan proses mahkamah (lihat perenggan 117–118 & 120–122).

(3) Doktrin *nemo judex in causa sua* (tiada sesiapa patut menjadi pengadil terhadap tindakannya sendiri) yang digunakan oleh defendan untuk permohonan pelucutan itu tidak boleh terpakai kerana defendan tidak mengemukakan apa-apa keterangan untuk menunjukkan akan terdapat konflik berhubung kewajipan dan kepentingan di pihak hakim ini jika

beliau sambung meneruskan kes ini sehingga kesimpulannya (lihat perenggan 129).

(4) Permohonan defendan untuk menggantung perintah yang menolak lampiran sementara menunggu keputusan rayuan terhadapnya telah dibenarkan kerana keadaan itu wujud dalam maksud 'special circumstances' yang dibentangkan dalam kes *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 dan oleh itu rukun keadilan asasi bahawa 'one should not be a judge in one's own cause' tidak dilanggari (lihat perenggan 26–27).]

Notes

For cases on application to recuse judge, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 4805–4825.

Cases referred to

Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors [2008] 5 MLJ 206, CA (refd)

Dar Al Arkan Real Estate Development Company and another v Al Refai and others [2014] EWHC 1055 (Comm), QBD (distd)

Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications [2013] 4 MLJ 351, FC (refd)

Dato' Tan Heng Chew v Tan Kim Hor [2006] 2 MLJ 293, FC (refd)

Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application [2001] 2 MLJ 305, FC (refd)

Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors [1995] 2 MLJ 213, CA (refd)

Johnson v Johnson [2000] HCA 48, HC (refd)

Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan [1999] 3 MLJ 1, FC (refd)

Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501, FC (refd)

Medicaments and Related Classes of Goods (No 2), In re [2001] 1 WLR 700 (refd)

Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd [2014] 10 MLJ 413, HC (refd)

Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd [2005] 3 MLJ 132; [2005] 2 CLJ 465, CA (refd)

Ser Choon Ing (Khatijah Rauf & Co) for the plaintiff.

Firoz Hussein bin Ahmad Jamaluddin (Muhammad Asmirul Asraf bin Fadli, M Lavendran with him) (Ngeow & Tan) for the defendant.

Su Geok Yiam J:

RECUSAL APPLICATION FILED BY THE DEFENDANT IN ENCL (59)

[1] On 10 February 2015, the defendant filed a certificate of urgency, encl (58), together with a recusal application vide a notice of application, encl (59) ('the recusal application'), to recuse me from continuing with the trial of this case and from hearing the defendant's case.

[2] The defendant filed the certificate of urgency because the continuation of the trial was scheduled to proceed on the following day ie 11 February 2015.

[3] The recusal application is supported by the defendant's affidavit-in-support, encl (60).

[4] The plaintiff filed an affidavit in reply, encl (63), to oppose the recusal application.

[5] The defendant filed an affidavit in reply, encl (64), to rebut the contents of the plaintiff's affidavit in reply.

[6] On 11 February 2015, when the case was called up for the continuation of the trial, Mr Ser Choon Ing ('Mr Ser'), learned counsel for the plaintiff, informed the court that he was served with a sealed copy of the recusal application and that he wished to file an affidavit in reply to oppose the defendant's application. Dato' Firoz Hussein bin Ahmad Jamaluddin ('Dato' Firoz'), learned counsel for the defendant, who had been retained by the defendant for the recusal application, informed the court that the recusal application had to be heard and disposed of first before the continuation of the full trial could proceed.

[7] Mr Ser asked for costs thrown away for the three days, ie 11, 12 and 13 February 2015, that had been fixed earlier for the continuation of the trial because the plaintiff and his counsel had attended court that morning and they have also made arrangements to attend court the next two days.

[8] The court granted the requests of the plaintiff and the defendant. The court, accordingly, vacated the three trial dates. The court also ordered the defendant to pay the costs thrown away for the three days to the plaintiff. This is because the defendant did not give prior notice to the plaintiff of his intention to file the recusal application. In fact, when the case came up before me on 21 January 2015 for pre-trial case management, there was no indication from the defendant that he would be filing an application to recuse me from continuing with the trial of the plaintiff's suit.

[9] On 26 February 2015, after the parties had filed their respective affidavits, ie the affidavit in reply of the plaintiff and the defendant's affidavit in reply to the plaintiff's affidavit in reply, Puan Ti Pei Si, the learned senior assistant registrar ('SAR') set the recusal application down for hearing before me on 2 April 2015.

[10] Unfortunately, on that date I had an appointment at the Hospital Kuala Lumpur for physiotherapy for my backache and the recusal application had to be adjourned to 18 May 2015 for hearing.

DECISION ON THE RECUSAL APPLICATION

[11] On 18 May 2015, I heard the recusal application. After having considered the written submissions that were filed by both parties and the authorities that were cited by both parties in support of their submissions, I dismissed encl (59) with costs of RM5,000 to be paid by the defendant to the plaintiff.

[12] Being dissatisfied with my decision to dismiss the recusal application with costs, the defendant filed a notice of appeal to the Court of Appeal.

STAY APPLICATION FILED BY THE DEFENDANT IN ENCL (80)

[13] On 24 June 2015, the defendant filed a certificate of urgency, encl (79), together with a stay application vide a notice of application, encl (80), ('the defendant's stay application'), and an affidavit in support, encl (81).

[14] In prayer 1, the defendant sought for an order from this court to stay the decision of this court dated 18 May 2015 dismissing the recusal application of the defendant pending the outcome of the defendant's appeal to the Court of Appeal.

[15] On 25 June 2015, the plaintiff filed an affidavit in reply, encl (86), to oppose the stay application on the grounds, inter alia, that it is an abuse of the process of the court. This is because a period of six years has passed since the plaintiff commenced his action in 2009 but the action has still not been disposed off due to the trial being postponed several times as a result of the appeals that were filed by the defendant.

Decision on the defendant's stay application

[16] On 25 June 2015, I heard the defendant's stay application.

[17] I noted that Mr M Lavendran did not cite the decision of the Court of

Appeal in *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132; [2005] 2 CLJ 465 as an authority to support the defendant's stay application. Hence, I felt that it was my duty to draw his attention to that decision. Consequently, I drew the attention of Mr M Lavendran, learned counsel for the defendant, to the decision of the Court of Appeal in *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132; [2005] 2 CLJ 465. I then stood the case down for Mr M Lavendran to get a copy of the case and to familiarise himself with it before I continued with the hearing of the stay application.

[18] After the court reconvened, he submitted that based on the decision of the Court of Appeal in that case, this court must grant the defendant's stay application to stay the proceedings pending the outcome of the defendant's appeal in the Court of Appeal against my decision to dismiss the defendant's recusal application.

[19] I duly agreed with and accepted his submissions.

[20] I, accordingly, granted order in terms of prayer 1 of the defendant's stay application with costs in the cause.

Reason for allowing the defendant's stay application

[21] The reasons why I allowed the defendant's stay application are as follows:

[22] Firstly, the general principle in granting a stay order is stated in the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd* [2004] 1 MLJ 257 ('the *Kosma Palm Oil*'s case'), where the Federal Court ruled as follows:

> (1) An appeal shall not operate as a stay of execution unless the court so orders. The paramount consideration governing an application for a stay of execution is that the appeal to this court, if successful, should not be rendered nugatory. If upon balancing all the relevant factors, this court comes to the conclusion that an appeal would be rendered nugatory without the grant of a stay or other interim preservation order, then it should normally direct a stay or grant other appropriate relief that has the effect of maintaining the status quo (paras 7 & 10).

[23] Secondly, in *Rowstead Systems Sdn Bhd v Bumicrystal Technology (M) Sdn Bhd* [2005] 3 MLJ 132; [2005] 2 CLJ 465, the Court of Appeal in allowing the stay application of the defendant/appellant held as follows:

> (3) This case came under the category of non-automatic disqualification. Hence there was a need to prove whether the element of bias exists. It has to be objectively decided, based on all the facts and circumstances of the case. The more important

question to be asked was whether it was proper for such decision to be made by the presiding judge against whom bias has been alleged. When a party alleges that a presiding judge is biased, and if the presiding judge himself decides he is not, such decision would infringe the rule of natural justice in that 'one should not be a judge in one's own cause'. This situation would come within the meaning of special circumstances (see para 13). Also in the event that a stay a proceedings was not granted and the learned JC be allowed to proceed with the hearing of this case, it would result in a waste of time and effort by all persons involved since if the Court of Appeal allows the appeal, the whole proceedings conducted by the learned JC would have to be completely expunged. In the circumstances it would be more expedient to allow a stay of the proceedings until the hearing of the appeal has been completed (see para 14).

[24] Thirdly, in *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206, the appellant's counsel had made an oral application for a stay of the proceedings as he intended to file an appeal to the Federal Court against the unanimous decision of the court's refusal of the oral application to recuse members of the panel from hearing his appeal.

[25] The Court of Appeal in allowing the appellant's stay application held as follows:

This court clearly had, at that stage, a balancing act to play. On the one hand, the appellant was clearly not interested to have her appeal heard on its merits that day. There was also no real urgency as such for the matter under appeal to be disposed of that day. The committal proceedings was filed at the appellant's instance. If, as evident from the persistent stance of the appellant's counsel of not wanting a determinative ruling of the issue under appeal, the court's desire to dispose of all appeals listed, and cases not be adjourned except for good reason, may be misconstrued. In the event of the issue being ruled against the appellant, the court be accused of being in undue hurry to impose an unwanted decision against her.

To accede to the request for stay however would mean that the appellant's counsel effectively would have obtained the adjournment that he had applied for in the first instance, and which had been refused by the court. That would, to a certain extent, undermine the authority of this court. Balancing these two factors, the considered and more prudent action to adopt was, it is better to sacrifice the latter over the former. The stay was allowed. The appeal was then adjourned.

[26] Hence, based on the clear authority of the three cases mentioned above, when a recusal application has been filed and it is dismissed by the trial judge or the presiding judge or judges, a situation has arisen that comes within the meaning of the 'special circumstances' laid down in the *Kosma Palm Oil*'s case.

[27] Therefore, as a trial judge, I am bound by the decision of the Federal Court and the two decisions of the Court of Appeal to grant a stay after

dismissing the recusal application so as not to infringe the rule of natural justice that 'one should not be a judge in one's own cause'.

BACKGROUND FACTS

[28] In order to understand the dismissal of the recusal application by the court, it is essential that I deal with the background facts which led to my earlier decision dated 17 June 2013 that allowed the plaintiff's suit and claims against the defendant for damages for defamation.

[29] These background facts are as follows:

[30] On 23 February 2009, the plaintiff sued the defendant for, inter alia, general, aggravated and exemplary damages, interest and costs for defamation vide a writ of summons dated 23 February 2009 ('the writ'), encl (1), and a statement of claim dated 20 February 2009 ('the statement of claim'), encl (2).

[31] On 12 March 2009, the plaintiff filed his amended statement of claim, encl (3).

[32] The plaintiff's suit is a civil defamation action against the defendant for, allegedly, falsely and maliciously publishing and/or causing the publication of the words complained of as set out in para 7 of his amended statement of claim which the plaintiff alleges are slanderous of the plaintiff ('the impugned words').

[33] The impugned words were alleged to have been uttered by the defendant at a closed door meeting called by the Chairman of a registered society known in Malay as the 'Persekutuan Persatuan-Persatuan Lembaga Pengurus Sekolah China Malaysia' ('the Dong Zong') on the morning of 2 November 2008.

[34] The plaintiff was the former principal of the college at the material time.

[35] The defendant is the Deputy Chairman of Dong Zong.

[36] In para 6 of his amended statement of defence, the defendant has denied publishing the impugned words.

[37] In para 6A of his amended statement of defence, the defendant also avers that the impugned words were not capable of disparaging the plaintiff.

[38] In para 6B of his amended statement of defence, the defendant further avers alternatively, that the impugned words were published on an occasion of qualified privilege.

[39] The suit was set down for full trial for four consecutive days, from 10–13 September 2012. Subsequently, the parties received notification from the court that the date 10 September 2012 had been vacated.

[40] The trial then commenced on 11 September 2012. It was continued on 12 September 2012, 28 November 2012 and on 26 February 2013.

[41] On 26 February 2013, the plaintiff closed his case at the end of the court proceedings for that day and the trial of the case was adjourned to the following day ie 27 February 2013, for the defendant to begin his defence by calling his four witnesses who were named in his list of witnesses starting with the defendant himself as the defendant's first witness.

[42] On 27 February 2013, the court ruled that the defendant's interpreter was not acceptable to the court on the ground that the court had no confidence in his competence as an interpreter.

[43] The defendant requested for the trial to be postponed to another date in order to enable him to appoint a new interpreter who is acceptable to the court. However, the court rejected the defendant's request and refused to adjourn the trial to a new date.

[44] The court then proceeded to enter judgment in default against the defendant in respect of liability. This was followed by the court directing the parties to return in the afternoon to submit on the issue of quantum of damages and costs, which the parties did. The court then reserved its decision and adjourned the case to 20 March 2013 for the court to deliver its decision.

[45] On 20 March 2013, the court vacated its earlier decision ie the judgment in default on liability. The rationale for this was that the court wished to have the benefit of full submissions in respect of liability and quantum in order to determine whether the plaintiff has proved its claim against the defendant on a balance of probability. The court then gave directions for the filing of written submissions by both parties. The court then fixed the case for clarification and/or decision on 17 June 2013.

[46] On 17 June 2013, at the conclusion of the plaintiff's case after hearing evidence given by the plaintiff's witnesses only, including the plaintiff, and

based on the evidence adduced, I allowed the plaintiff's claim for damages, interest and costs against the defendant for defamation.

[47] I awarded to the plaintiff a sum of RM300,000 as general damages inclusive of aggravated and exemplary damages together with interest thereon at 5%pa from the date of the filing of the plaintiff's writ of summons until the date of full realisation and costs of RM100,000.

[48] Being dissatisfied with my decision dated 17 June 2013, the defendant filed a notice of appeal to the Court of Appeal against my decision.

[49] In my grounds of judgment dated 30 July 2013 ('grounds of judgment dated 30 July 2013'), I gave my reasons as to why, after only having heard evidence that was given by the plaintiff's seven witnesses including the plaintiff himself, and based only on the evidence adduced by the plaintiff, I had allowed the plaintiff's claim on liability and damages against the defendant and why I had awarded to the plaintiff a sum of RM300,000 as damages and a sum of RM100,000 as costs.

[50] In my grounds of judgment dated 30 July 2013, I held, inter alia, as follows on liability:

(a) 'The impugned words were published maliciously by the defendant ...' (p 19, line 7 of the grounds of judgment dated 30 July 2013, exh 'CSH1');

(b) 'Hence, the plaintiff had proven on a balance of probability that the defendant had uttered and published the defamatory words at the 1st meeting and in doing so, the defendant had maliciously and falsely published the defamatory statements which were calculated to disparage the plaintiff ...' (p 19, line 15 of the grounds of judgment dated 30 July 2013, exh 'CSH1');

(c) 'Hence, the Court was able to draw an irresistible inference that the impugned words were defamatory statements comprising baseless accusations or lies which were imputed to the plaintiff by way of innuendo, which discredited the plaintiff ...' (p 20, line 16 of the grounds of judgment dated 30 July 2013, exh 'CSH1'); and

(d) 'the defendant had done that to poison the minds of the listeners ... (at the meeting) in order to influence the attendees at the EGM to vote against the proposal to reappoint the plaintiff as the Principal of the College' (p 19, lines 22–25, p 20, line 26 of the grounds of judgment dated 30 July 2013, exh 'CSH1');

[51] As for damages, upon applying the trite law on damages and the principles that are applicable to the factors and circumstances in the instant case, I held that since the plaintiff is a famous educationist and academic, a

prominent writer of more than 20 books, a former Member of Parliament and a prominent public figure, and after taking into account the gravity of the defamatory statements that were uttered by the defendant against the plaintiff, and other factors as well, the court awarded to the plaintiff a sum of RM300,000 as damages inclusive of aggravated and exemplary damages and costs of RM100,000 (pp 22–24, of the grounds of judgment dated 30 July 2013, exh 'CSH1').

[52] I also dismissed the plaintiff's claim for special damages of RM331,200 being the loss of three years salary (RM9,200 x 36 months) or at least one year salary of RM110,400 on the following grounds:

(a) From the views of the majority of the delegates at the EGM which comprised the state representatives of the Dong Zong, it was clear to the court that there was a serious concern that if the plaintiff's contract as the Principal of the College was renewed it would not be for the good of the College because the relationship between the Chairman of the Dong Zong and the plaintiff was strained and it was likened to the relationship of an estranged husband and wife whose marriage had no more love left;

(b) In the court's view, based on the evidence before the court, the factor which had caused the strain in the relationship of the 2 men was the manner in which the plaintiff had openly and publicly lobbied for support for his reappointment from the students of the College and their parents by virtue of the changes which he had implemented while he was the Principal of the College;

(c) However, it was clear to the court that the Chairman of the Dong Zong did not support the plaintiff in the latter's quest to garner support for his reappointment as the Principal of the College in that manner;

(d) Hence, the majority of the delegates at the EGM did not support the reappointment of the plaintiff as the Principal of the College as they were of the view that the reappointment of the plaintiff as the Principal of the College would be detrimental to the College in view of the strained relationship between the plaintiff and the Chairman of the Dong Zong; and

(e) By virtue of the above, in my judgment, the defamatory statement of the defendant did not cause the plaintiff to suffer the special damages as claimed by the plaintiff as it did not contribute partly or wholly to the non-renewal of the plaintiff's contract as the Principal of the College.

(pp 26–27 of the GOJ dated 30 July 2013, exh 'CSH1').

[53] I further found that the plaintiff's claim for a sum of RM100m as general, aggravated and exemplary damages was excessive (p 27 of the GOJ dated 30 July 2013, exh 'CSH1').

[54] On 14 August 2013, the defendant filed an application vide a notice of application ('the defendant's stay application'), encl (42), together with a supporting affidavit, encl (43), to stay my decision dated 17 June 2013 pending the outcome of his appeal against my decision at the Court of Appeal.

[55] On 20 August 2013, the plaintiff filed an affidavit in reply, encl (45), to oppose the defendant's stay application.

[56] On 22 August 2013, I granted order in terms of the defendant's stay application, encl (42), to stay my decision dated 17 June 2013 pending the outcome of his appeal against my decision at the Court of Appeal.

DECISION OF THE COURT OF APPEAL

[57] On 14 August 2014, the Court of Appeal allowed the defendant's appeal with costs.

[58] The Court of Appeal set aside my decision and remitted the plaintiff's claim back to the High Court for the continuation of the trial of the plaintiff's claim against the defendant but not necessarily before a different judge.

[59] The order of the Court of Appeal states as follows:

(a) ...

(b) Tindakan ini dikembalikan kepada Mahkamah Tinggi untuk sambung bicara *tidak semestinya di hadapan Hakim yang berlainan* dan di hadapan jurubahasa berkelayakan (qualified interpreter) untuk mendengar keterangan 4 saksi berikut:

(i) Chow Siew Hon

(ii) Yap Sin Tian

(iii) Kho Hoi Ming @ Hee Hai Ming

(iv) Chua Ah Han

(Emphasis added).

[60] On 18 December 2014, the defendant wrote a letter, encl (50), through his solicitors, Messrs Abdul Malik Hakim, to inform Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin, the Right Honourable Chief Judge of Malaya, that on 17 December 2014, he was notified by the Kuala Lumpur High Court that the instant case has been remitted back to the High Court by the Court of Appeal and that I was assigned to continue with the full trial of the case.

[61] The defendant then set out the summary of the background of this case and requested for the trial of this case to be continued by another judge on the following grounds:

> 9. Berdasarkan kepada perkara-perkara yang dinyatakan di sini, ianya adalah wajar dan dalam kepentingan keadilan untuk seorang Yang Arif Hakim yang baru dilantik untuk meneruskan dengan sambung bicara guaman tersebut di atas oleh kerana Yang Arif Hakim Datuk Su Geok Yiam telah mendengar Guaman tersebut sehingga 'keselesaiannya' dan telah mencapai satu keputusan fakta dan undang-undang yang amat memprejudiskan kepentingan Defendan, sepertimana diterangkan dalam Alasan Penghakimannya.

[62] In his reply dated 7 January 2015 that was sent to the defendant's solicitors vide Tuan Shazali bin Dato' Hidayat Shariff, his special officer, the Right Honourable Chief Judge of Malaya rejected the defendant's request on the following grounds in Malay:

> 2. Ingin dimaklumkan bahawa permohonan tuan untuk kes didengar di hadapan Hakim lain telah ditolak. Ini adalah kerana kes ini berada di peringkat sambung bicara dan Mahkamah Rayuan tidak memerintahkan agar kes ini dibicarakan di hadapan Hakim yang lain.
>
> 3. Oleh yang demikian, kes ini hendakalah didengar oleh YA Datuk Su Geok Yiam sehingga selesai.

[63] The grounds in English are that since this case is a part heard case, it is not suitable for the trial of this case to be continued by another judge and the Court of Appeal in its order dated 14 August 2014 also did not direct for the trial of this part heard case to be continued by another judge.

[64] On 8 January 2015, the learned senior assistant registrar set the case down before me for the pre-trial case management on 21 January 2015 and for the continuation of the full trial for four consecutive days ie on 10 February 2015, 11 February 2015, 12 February 2015 and 13 February 2015.

[65] On 21 January 2015, the case came up before me for pre-trial case management. The defendant did not indicate that he would be filing an application to ask me to recuse myself. So I maintained the full trial dates.

GROUNDS FOR THE RECUSAL APPLICATION

[66] I shall now deal with the grounds for the recusal application.

[67] The defendant relied on the following grounds in the recusal application:

(1) In this case, I have already made a finding in favour of the plaintiff based only on the plaintiff's evidence without hearing the defendant's case;

(2) I have found that the plaintiff has defamed the defendant and I have also decided that the plaintiff is of good character and has a good reputation;

(3) I have also decided that there was malice on the part of the defendant when he uttered the defamatory words in order to prejudice the reappointment of the plaintiff as the principal of the New Era College ('the College');

(4) Since the defendant's main defence is that the alleged defamatory words cannot affect the reputation of the plaintiff and the words are not actionable, and I have already made findings in favour of the plaintiff ('the previous findings') in my grounds of judgment dated 30 July 2013, it will not be easy for the defendant to convince me otherwise and to reverse my previous findings even after I have heard the defendant's case; and

(5) It would be appropriate for me to recuse myself from continuing to hear the case.

THE DEFENDANT'S SUBMISSIONS

[68] I shall now deal with the defendant's submissions.

[69] Dato' Firoz, learned counsel for the defendant, submitted as follows:

(a) in this case, the defendant disputes that the words allegedly uttered by him were in fact defamatory and/or capable of bearing any reference to the plaintiff in this case but I have already decided that the plaintiff has been defamed by the defendant;

(b) the defendant also wishes to challenge the plaintiff's good reputation and character but I have already decided that the plaintiff is of good character and reputation;

(c) hence, it will be embarrassing for me, when I am asked at the conclusion of the trial and after having heard the defendant's case, to make a decision that is wholly different from my previous decision dated 17 June 2013 on the issue whether the plaintiff was in fact defamed by the defendant and on the issue concerning the character and reputation of the plaintiff;

(d) more importantly, the circumstances of the instant case show that there is a real danger of bias on my part against the defendant as I have already arrived at conclusions of fact and law which are prejudicial to the defendant in my grounds of judgment dated 30 July 2013;

(e) the principle of *nemo judex in causa sua* must, therefore, be followed in this case; and

(f) I should recuse myself even though I am not inclined to be biased against the defendant and the defendant has not attacked my personal integrity as a judge in any way whatsoever or made any allegation of actual bias against me.

[70] In support of his submissions, Dato' Firoz cited the decisions of the courts in *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, *Johnson v Johnson* [2000] HCA 48 and *Dar Al Arkan Real Estate Development Company and another v Al Refai and others* [2014] EWHC 1055 (Comm), respectively.

[71] In *Dato' Tan Heng Chew v Tan Kim Hor* [2006] 2 MLJ 293, the Federal Court held that if the circumstances of the case show that there is a real danger of bias on the part of the judge, it is advisable for the judge to recuse herself even though the trial judge feels that she is not inclined to be biased.

[72] In the Australian case of *Johnson v Johnson* [2000] HCA 48, the court held that the test for reasonable apprehension of bias is that justice must both be done, and be seen to be done and if the fair minded people reasonably apprehend or suspect that the tribunal has prejudged the case, they cannot have confidence in the decision.

[73] In *Dar Al Arkan Real Estate Development Company and another v Al Refai and others* [2014] EWHC 1055 (Comm), the judge recused himself due to the fact that there was a real possibility that a fair minded and informal observer would conclude that there was a real possibility that the judge, by going into the credibility of the witnesses which was detailed and specific and then reaching a conclusion adverse to the claimant, might have prejudged the case.

THE PLAINTIFF'S SUBMISSIONS

[74] I shall now deal with the plaintiff's submissions.

[75] Mr Ser Choon Ing, learned counsel for the plaintiff, reiterated the contents of the plaintiff's affidavit in reply and submitted as follows:

> The recusal application should be dismissed because the Court of Appeal did not order the case to be tried before another Judge. The Managing Judge of the Kuala Lumpur Civil High Court has already rejected the defendant's request to assign another judge to continue with the trial of this case. The Managing Judge must have taken all the factors into consideration ie the cost, time, probability of prejudice, etc, before rejecting the defendant's request and directing me to hear the defendant's case.

[76] The Right Honourable Chief Judge of Malaya in his letter dated 7 January 2015, has also rejected the defendant's request to assign another judge to continue with the trial of this case.

[77] More importantly, there is no real danger of bias on my part even though I have arrived at conclusions of fact and law because I have only arrived at them based on the evidence of the plaintiff's witnesses.

[78] I have decided the instant case in favour of the plaintiff after considering the plaintiff's case only since there was no evidence forthcoming from the defendant. There is no evidence to show that I will be biased against the defendant or that the defendant's interest will be prejudiced if I were to continue to hear this part heard case by hearing the defendant's case before making my decision.

[79] When the full trial is continued with the calling of the defendant's witnesses by the defendant, I will have the benefit of hearing the defendant's case. I will only decide on the issue of liability and the issue of quantum at the conclusion of the trial after taking into consideration the evidence adduced by both the plaintiff's witnesses and the defendant's witnesses and the submissions of and the authorities cited by both parties.

[80] A part heard case is not suitable to be continued by another judge and the Court of Appeal did not direct for this part heard case to be continued by another judge.

[81] It is merely an assumption of the defendant that I will not be able to keep an open mind if I were to continue to try the instant case.

[82] If this case is assigned to another judge there is a big possibility that the new judge will direct for a trial de novo of this case ie direct the plaintiff to reopen the plaintiff's case, in which case, the parties will have to incur additional costs and it will also be a waste of the court's time.

[83] In *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351, the Federal Court held that it is settled law that a judgment may only be challenged on the ground of actual bias or real danger of bias and not on the ground of apparent bias. The Federal Court also held that the phrase 'actual bias' applies to a situation where a judge has been influenced by partiality or prejudice in reaching his decision and where it has been demonstrated that a judge is actually prejudiced in favour of or against a party. Hence, the Federal Court held that the substantial copying of the submissions of the counsel of the winning party in the judgment is not

sufficient to support a serious allegation of 'real danger of bias' against the court.

[84] In this case, it is not sufficient for the defendant to justify my recusal by merely showing that the conclusion of the judgment did not favour him. He must do more than that. He must show some elements of actual bias on my part. In fact, in the defendant's own affidavit in reply, he admitted that there is no actual bias on my part. Furthermore, a judgment which is not in favour of the defendant cannot be deemed prejudicial to the defendant.

[85] In *Residence Hotel and Resorts Sdn Bhd v Seri Pacific Corp Sdn Bhd* [2014] 10 MLJ 413 ('the *Residence Hotel*'s case'), the court held that a judge's decision which does not favour a litigant cannot be used as an instrument to recuse the judge as the opposing party's right is to file an appeal to the Court of Appeal.

[86] The defendant's submission on the doctrine of *nemo judex in causa sua* (no one should be a judge in his own cause) is misleading as this principle is only applicable where there is a conflict of duty and interest on the part of the judge.

[87] Certainly, this is not the case in this application because the defendant has not shown that there is a conflict of duty and interest on my part.

[88] The defendant has failed to show that there is a real danger of bias on my part. This is because I had made the findings in favour of the plaintiff based on the plaintiff's case only and the defendant can always call his witnesses during the defendant's case. There is no real likelihood of bias as each party is given a fair chance to present his own case.

[89] Therefore, the defendant's recusal application, encl (58), has no merit and ought to be dismissed with costs.

THE DEFENDANT'S SUBMISSIONS IN REPLY

[90] In reply, Dato' Firoz reiterated the contents of the defendant's affidavit in reply and submitted as follows.

[91] The *Residence Hotel*'s case is not applicable to the facts of the instant case because it only involves a summary judgment for an application that was arrived at based on affidavit evidence and not a judgment for a civil action that was arrived at based on the evidence of the witnesses after a full trial.

[92] Since the order of the Court of Appeal dated 14 August 2014 has merely directed that this part heard case be remitted to the High Court to be continued and the words used are 'tidak semestinya' in Malay or 'not necessarily' in English before another judge, this case can still be tried by another judge who has the discretion to continue with the trial by hearing the defendant's case instead of directing that the case be tried de novo.

[93] The recusal application is not a challenge against me personally and the defendant has not averred that there will be actual bias on my part.

[94] Nevertheless, I should recuse myself even though I am not biased against the defendant on the ground that justice must not only be done but must be seen to be done.

[95] Therefore, the defendant's application, encl (58), has merits and ought to be allowed with costs in the cause.

REASONS FOR MY DISMISSAL OF THE RECUSAL APPLICATION

[96] I shall now give the reasons why I dismissed the recusal application. They are as follows.

The law

[97] I shall first deal with the law concerning the recusal of judges.

[98] It is trite law that the presumption of impartiality of a judge must be upheld (see *Che Minah bt Remeli v Pentadbir Tanah, Pejabat Tanah Besut, Terengganu & Ors* [2008] 5 MLJ 206).

[99] In that case, the Court of Appeal held as follows at p 207:

> (per Abdul Malik Ishak JCA) it was an acceptable proposition to say that a judge's impartiality is presumed and any party seeking disqualification must establish the circumstances and situations to justify the disqualification of the judge. There is a strong presumption of judicial impartiality. The standard of reasonable apprehension of bias must necessarily refer to an apprehension based on serious grounds. Each case must therefore be examined contextually and the inquiry would be based entirely on the facts. The appeal related to the question of leave and the issue on the fatwa (edict) and its ramifications had no role to play at all.

[100] In *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1 ('*the Majlis Perbandaran Pulau Pinang*'s case'), the court laid down the test for recusing a judge ie the real danger of bias test. In that case, the court held that the real

danger of bias test is a compromise between the reasonable suspicion of bias test and the real likelihood of bias test. This is because the court wished to stress that it is contemplating a lower standard than the likelihood or probability of bias, that is to say, a real possibility of bias. This test was adopted by the court in that case in order to avoid having to set aside a judgment upon some insubstantial ground and upon the flimsiest pretext of bias.

[101] In that case, the court held as follows at p 69:

> The 'real danger' test favoured in *Gough* could be seen as a compromise between 'the reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that the court is contemplating a lower standard than 'likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see Gough at pp 668C-D, 670E-F, per Lord Goff; p 671B-C, per Lord Woolf.
>
> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v Gough* per Lord Goff, at p 670D-E).
>
> Having given careful consideration to the matter, we prefer the test of apparent bias given in *Gough* ('the real danger of bias' test) as this will avoid setting aside of judgments upon quite insubstantial grounds and the flimsiest pretexts of bias'.

[102] The real danger of bias test that was laid down in the *Majlis Perbandaran Pulau Pinang*'s case was reconfirmed by the Federal Court in *Allied Capital Sdn Bhd v Mohamed Latiff bin Shah Mohd and another application* [2001] 2 MLJ 305 at p 310.

[103] In *Hock Hua Bank (Sabah) Bhd v Yong Liuk Thin & Ors* [1995] 2 MLJ 213, the Court of Appeal held as follows with regard to the real likelihood of bias test:

> (6) (per NH Chan JCA) other than an interest which is pecuniary or proprietary in the subject matter of a proceeding, the law does not assume bias so as to disqualify a judge from acting in his judicial capacity. To disqualify a judge from acting in his judicial capacity on the ground of his interest (other than pecuniary or proprietary) in the subject matter of the proceeding, a real likelihood of bias must be shown.
>
> (7) (per NH Chan JCA) In considering whether there was a real likelihood of bias, the court does not look at the mind of the judge himself to see if there was a real likelihood that he would, or did in fact, favour one side at the expense of the other. The court looks at the impression which would be given to other people. If right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, the judge should not hear the case.

[104] In my considered view, even though the *Residence Hotel*'s case concerns only a summary judgment for an application which was arrived at by the learned judge based solely on affidavit evidence as opposed to a judgment that was arrived at for a civil action after a trial with the calling of witnesses like in

A the present case, the same principles for the recusal of a judge ought to apply.

[105] In that case, the defendant filed an application, encl (20), to recuse the judge from proceeding to hear and to decide encl (17), inter alia, on the grounds that the judge had allowed the plaintiff's application for summary B judgment. It was also contended that the judge in his grounds of judgment ie the summary judgment, had 'advised' the defendant to reconsider its position as to whether to proceed with the counterclaim. However, the court dismissed the application with costs.

C

[106] The court held as follows:

> (27) A judge's decision which did not favour a litigant cannot be used as an instrument to recuse the judge or to remove the case to another court as the opposing party's right is to file an appeal to the Court of Appeal to have the decision D corrected if the loosing party is not satisfied with the decision. ? a party who is not satisfied with the decision should not as a matter of right apply to recuse the judge in hearing other pending or related matters ...
>
> (29) ... preconceived opinion by a judge do not constitute such a real bias so as to justify the recusal of the judge as the decision of the court in a pending matter will E still be based and decided on the evidence and material produced or presented before the court and not on conjecture or speculation. There must be a strong foundation or ground for supposing that the judge or judicial officer had so acted in such unjudicial fashion that he cannot be expected fairly to discharge his judicial function and duty.

F

[107] In the instant case, the defendant has filed an appeal to the Court of Appeal against my earlier decision dated 17 June 2013 and as stated earlier the Court of Appeal has allowed his appeal and has set aside my decision and remitted the case back to the Kuala Lumpur High Court to be continued not G necessarily by a different judge.

[108] If the Court of Appeal was of the considered view that it would not be proper or fair for me to continue with the trial of the instant case, I am certain, it would have ordered that this case be continued by another judge. The same H is true of the decisions of the managing judge and the Right Honourable Chief Judge of Malaya both of whom have rejected the defendant's request to have the instant case continued by another judge.

[109] Since the defendant will be given a fair chance to present his case and to I submit at the conclusion of the trial, there is no real likelihood of bias.

[110] I am of the considered view that based on the facts and circumstances of the instant case there is no real danger of bias on my part even if I were to continue with the trial of this case by hearing the defendant's case.

[111] In *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 MLJ 351 ('the *Dato' See Teow Chuan*'s case'), the Federal Court held as follows at p 371E:

> (38) In the present applications before us, both the counsel conceded that they are not relying on actual bias as such, but instead on apparent bias arising out of the contents of the judgment, which was substantially copied from submissions of counsel for the first and second respondents. They contended that the content of the judgment is evident of the apparent bias on the part of the court. It is settled law that, in this country a judgment may only be challenged on the ground of actual bias or real danger of bias and not on the ground of apparent bias (see *Mohamad Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501). In *Metramac*, the court held that there was a real danger of bias as apparent from the content of the judgment of the court. At para 98 the court stated:
>
> > [98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence 'yet they make use of injudicious, unfair and extravagant language' in such extreme, outspoken and unbalance terms in that they were 'out of all proportion to or not commensurate with the circumstances before the court' and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its argument were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal'. In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

[112] On the question 'what is 'actual bias'?' the Federal Court in *Dato' See Teow Chuan*'s case followed the English authority of *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 and held as follows at p 370:

> (36) Similarly, Lord Philips MR in *Re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at paras 38–39 of the judgment said:
>
> > 38. The decided cases draw a distinction between 'actual bias' and 'apparent bias'. The phrase 'actual bias' has not been used with great precision and has been applied to the situation
> >
> > > (1) where a judge has been influenced by partiality or prejudice in reaching his decision and
> > >
> > > (2) where it has been demonstrated that a judge is actually prejudiced in favour of or against a party.
> > >
> > > 'Apparent bias' describes the situation where circumstances exist which give rise to a reasonable apprehension that the judge may have been, or may be, biased.
> >
> > 39. Findings of actual bias on the part of a judge are rare. The more usual issue

is whether, having regard to all the material circumstances, a case of apparent bias is made out.

[113] Therefore, in *Dato' See Teow Chuan*'s case, the Federal Court held that the substantial copying of the submissions of the counsel in the judgment is not sufficient to support such a serious allegation of real danger of bias against the court.

[114] In deciding whether there is a 'real danger of bias' in the Court of Appeal's statements, the Federal Court in *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501 ('the *Metramac Corporation*'s case'), held as follows:

> [165] In *State of Uttar Pradesh v Mohd Naim* , SK Das J, delivering the judgment of the court said that in such cases 'it is relevant to consider (a) whether the party whose conduct is in question is before the court or has an opportunity of explaining or defending himself; (b) whether there is evidence on record bearing on that conduct justifying the remarks; and (c) whether it is necessary for the decision of the case, as an integral part thereof, to animadvert on that conduct'.
>
> [166] I agree that the sensible approach for this court to take is first to consider whether the statements, on the face of it, are offensive, objectionable, disparaging, unjust, unjustified and so on. If so, then the court should consider the three points mentioned above. However, there may be other factors arising from the circumstances of the case that may be relevant.

[115] Therefore, by applying the above approach, the Federal Court in the *Metramac Corporation*'s case found that there was a real danger of bias on the ground that the Court of Appeal had made 'injudicious and unfair' remarks against the two persons concerned. At pp 532–533, the Federal Court said as follows:

> [98] We are therefore inclined to agree with the submission of learned counsel for the appellant that the remarks and findings found particularly in the main judgment of the Court of Appeal are not supported by evidence 'yet they 'make use of injudicious, unfair and extravagant language' in such extreme, outspoken and unbalance terms in that they were 'out of all proportion to or not commensurate with the circumstances before the court' and they excite an apprehension that the Court of Appeal might not bring an unprejudiced mind to the resolution of the matter before it. There is indeed a real danger that the appellant's case had been unfairly regarded with disfavour, and its arguments were not addressed by the Court of Appeal although they were either submitted or apparent from the record of appeal.' In short the element of real danger of bias is present especially in the main judgment of the Court of Appeal.

[116] Reverting back to the instant case, I am of the considered view that the defendant has also failed to show any fact which would lead a right minded person to think that there is a real danger of bias on my part.

[117] It is clear from my grounds of judgment dated 30 July 2013 that after I have heard the plaintiff's case only and without hearing the defendant's case I have made findings in favour of and also against the plaintiff. I have also made findings against the defendant. However, I have made those findings purely because the defendant was not ready to proceed with his case by calling his witnesses who included himself as the first witness.

[118] The determination of the facts by me on the issue concerning the reputation and good character of the plaintiff and the issue whether the defendant had maliciously published defamatory statements about the plaintiff were solely made based on the evidence given by the plaintiff's witnesses. In my considered view, even though I have arrived at conclusions of fact and law, these conclusions of fact and law are not prejudicial to the defendant because I have only arrived at them based on the evidence of the plaintiff's witnesses and without the benefit of the evidence of the defendant's witnesses.

[119] Therefore, based on the circumstances of this case, even though the issue concerning the character and reputation of the plaintiff and the issue concerning whether the impugned words are defamatory of and concerning the plaintiff have already been decided by me earlier and my findings and reasons are set out in my grounds of judgment dated 30 July 2013, there is no real danger of bias if I were to continue with the trial of the instant case.

[120] The fact that I have delivered a judgment in favour of the plaintiff earlier does not by itself constitute a real danger of bias. It is not sufficient for the defendant to justify my recusal merely because I had decided against him earlier. This is because the judgment of the court after the defendant's case is concluded will still be delivered by me but it will be based on the evidence that has been adduced by the plaintiff earlier and the evidence that will be adduced by the defendant before the court.

[121] If this application is allowed, it may cause the parties to incur more costs and the time of the court that was spent hearing the plaintiff's case to be wasted if the new judge who is assigned to hear the case decides to order a trial de novo of this case.

[122] This application is an abuse of the court process as the defendant has conceded that there is no real or actual bias on my part and the defendant is also fully aware that I did not hear the defendant's case previously because the

defendant was not ready to proceed with his case for the reasons stated in my grounds of judgment dated 30 July 2013.

[123] In the *Residence Hotel*'s case, the court (under 'Held') held as follows:

> (6) The application was frivolous and was an abuse of the process of the court and was bordering interference with the judicial function of a judge who had made findings upon adjudication on the factual and legal disputes of the parties. Further, there was no evidence to support the allegation of bias, nothing upon which a reasonable person could reach that conclusion of bias other than, perhaps, a mere suspicion that the Bench may not bring an impartial mind to bear.

[124] Furthermore, even though I have decided on the two issues earlier, it will not be embarrassing for me when I am asked later at the end of the full trial by the defendant to arrive at a wholly different conclusion that favours the defendant and is adverse to the plaintiff. This is because as a judge I am trained to keep my mind open until such time when I have to decide on the issues of liability, damages and costs between the parties.

[125] I am of the considered view that the case of *Dar Al Arkan Real Estate Development Company and another v Al Refai and others* [2014] EWHC 1055 (Comm) is distinguishable from the facts of the instant case. This is because in that case the judge recused himself due to the fact that there was a real possibility that a fair minded and informal observer would conclude that there was a real possibility that the judge might have prejudged the case, by going into the credibility of the witnesses which was detailed and specific and then reaching a conclusion adverse to the claimant.

[126] Since I have not prejudged the instant case, there cannot be any reasonable apprehension of bias on my part and fair minded people will not reasonably apprehend or suspect that I have prejudged the case. Hence, they will have confidence in the decision that I will deliver after hearing the defendant's case.

[127] It is trite law that justice must both be done and be seen to be done by the court. This would necessarily mean the doing of justice by the court to both parties ie the plaintiff and the defendant.

[128] The court cannot favour one party over the other party. Therefore, it would not be fair to the plaintiff if I were to agree to recuse myself from continuing with the trial because the new judge may direct the case to be tried *de novo*. By refusing to recuse myself, I am also being fair to the defendant because the defendant can still file an appeal to the Court of Appeal in the event that I decide against him at the conclusion of the trial (see *Johnson v Johnson* [2000] HCA 48).

[129] The doctrine of *nemo judex in causa sua* (no one should be a judge in his own cause) that was relied upon by the defendant to recuse me from continuing with the trial of the instant case, is inapplicable to the facts of the instant case because the defendant has not adduced any evidence to show that there will be a conflict of duty and interest on my part if I were to refuse to recuse myself and if I were to continue to try the instant case until its conclusion.

[130] The Federal Court in *Dato' See Teow Chuan*'s case held as follows at p 370:

> [35] The next issue raised is that of bias. It is settled law that bias is one of the grounds accepted by the court as a basis for a review under r 137. This is founded on the simple reason that if the court's decision is tainted by bias, there can be no justice and as such the decision ought to be vitiated. In England, bias has been classified into two broad categories namely: actual bias and apparent bias. In *Pinochet (No 2)*, Lord Browne-Wilkinson spoke of these two categories, he observed:
>
> > As I have said, Senator Pinochet does not allege that Lord Hoffmann was in fact biased. The contention is that there was a real danger or reasonable apprehension or suspicion that Lord Hoffmann might have been biased, that is to say, it is alleged that there is an appearance of bias not actual bias.
> >
> > The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behaviour may give rise to a suspicion that he is not impartial, for example because of his friendship with a party. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial.

CONCLUSION

[131] In the premises, my dismissal of the defendant's recusal application with costs of RM5,000 is fair, appropriate and justified based on the facts and circumstances of the instant case.

Enclosure 59 dismissed but stay of that decision pending appeal allowed.

Reported by Ashok Kumar